THE RISK OF LOSS AFTER AN EXECUTORY CONTRACT OF SALE IN THE COMMON LAW.

IN the English and American law of sales of personal property there is curiously little discussion in regard to the risk of property before transfer of title. It was assumed without discussion that the maxim *res perit domino* was of universal application,[1] and this bare assertion has sufficed to fix the law.[2] In the absence of agreement to the contrary, the risk is with the seller, though the property be identified, till the moment when title is transferred. If the property is destroyed or injured before that time, the buyer cannot be compelled to pay the price,[3] and if he has paid the price in advance, it may be recovered.[4] It is well understood, however, that the parties may, by special agreement, fix

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[1] It is curious that this maxim of the Roman law should be quoted in our law chiefly in a class of cases to which it did not apply in the Roman law.

[2] In Noy's Maxims, c. xlii. it is said: "If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; . . . and if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, *because by the bargain the property was in the buyer.*" It will be observed that the case here supposed is a sale with a lien for the price. As the dependency of mutual promises in any executory bilateral contract was little understood before the present century, and the question whether impossibility is so far an excuse for non-performance of a dependent promise, that the counter promise must nevertheless be performed, has been settled still more recently, it is obvious that only modern decisions have much value in this discussion. In Rugg *v.* Minett, 11 East, 210, it was taken for granted that risk attends title, and the only discussion related to the question whether title had in fact passed. So clear is the law that it is hardly formally stated by so acute a writer as Benjamin. The only statement he makes is a casual one, without citation of authorities, in § 308.

[3] Calcutta Co. *v.* De Mattos, 32 L. J. Q. B. 322, 335; Tillson *v.* United States, 129 U. S. 101; Hays *v.* Pittsburgh Packet Co., 33 Fed. Rep. 552; Jones *v.* Pearce, 25 Ark. 545; Crawford *v.* Smith, 7 Dana, 59; Brown *v.* Childs, 2 Duv. 314; Lingham *v.* Eggleston, 27 Mich. 324; Hahn *v.* Fredericks, 30 Mich. 223; Wilkinson *v.* Holiday, 33 Mich. 386; Slade *v.* Lee, 94 Mich. 127; Drews *v.* Ann River Logging Co., 53 Minn. 199; Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Towne *v.* Davis (N. H.), 22 At. Rep. 450; Terry *v.* Wheeler, 25 N. Y. 520; Kein *v.* Tupper, 52 N. Y. 550.

[4] Logan *v.* Le Mesurier, 6 Moo. P. C. 116; Stone *v.* Waite, 88 Ala. 599; Joyce *v.* Adams, 8 N. Y. 291; Williams *v.* Allen, 10 Humph. 337. The citations in this and the preceding note might easily be increased.

the transfer of the risk at a different time from the moment when the title passes.[1]

Thus far it has been assumed that the buyer was not in default at the time of the accident. If the buyer was in default, the seller has several remedies against him. He is generally allowed to treat the goods as the buyer's, and sue for the price, or he may retain the goods and sue for damages for breach of the contract. If he takes the first course, he becomes a bailee, and if a loss occurs without his fault the buyer must bear the loss; if the latter course, the loss falls on the seller. If the seller has not indicated which course he intends to pursue, the loss would probably fall on him, since the former remedy is the more unusual, and it would not be assumed that the seller was holding the property for the benefit of the buyer unless he had indicated it in some way.[2]

The law in regard to risk in sales of personal property is thus generally settled, and though without discussion, yet probably correctly and in accordance with the intention of the parties. There are a few cases, however, where there is a conflict of decision. Suppose the seller delivers the property to the buyer with the agreement that the seller shall retain title until the price is paid, — the ordinary case of conditional sale, — and before the time for payment the property is destroyed. This sort of transaction has become very common of late years, and not infrequently the buyer gives a promissory note containing the statement that the note is given for a specified chattel, the title of which is to remain in the seller until the note is paid. Should the loss fall on the seller because he holds the legal title?[3]

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[1] Inglis *v.* Stock, 10 App. Cas. 263; Martineau *v.* Kitching, L. R. 7 Q. B. 436; Castle *v.* Playford, L. R. 5 Ex. 165; 7 ib. 98; Alexander *v.* Gardner, 1 Bing. N. C. 671; Fragano *v.* Long, 4 B. & C. 219.

[2] See Neal *v.* Shewalter, 5 Ind. App. 147, where the loss was thrown on the sellers because they "did not place themselves in the position of bailees for the" purchasers.

[3] In Top *v.* White, 12 Heisk. 165, this question arose in regard to slaves which had been delivered with an estate under a contract of sale, but the title had been retained. Before the contract was fulfilled the slaves were emancipated. It was held that the purchaser must pay the price, the court saying (at p. 190): "In the application of the maxim, property perishes to the owner, I understand by the owner not the party who has the naked legal title, but the party who is the beneficial equitable owner." So makers of promissory notes such as those described have been held liable, though the property which has the consideration of the note perished before its maturity. Burnley *v.* Tufts, 66 Miss. 48; Tufts *v.* Wynne, 45 Mo. App. 42; Tufts *v.* Griffin, 107 N. C. 47. Contrary decisions are Randle *v.* Stone, 77 Ga. 501, and Arthur *v.* Blackman, 63 Fed. Rep. 536 (North Dist. of Washington).

In Swallow *v.* Emery, 111 Mass. 355, such a note was held not to be a negotiable

In order to determine the proper answer to this question, it is necessary to consider the legal position of the parties to an executory contract for the sale of personal property. Only personal obligations are created. The purchaser acquires no *jus in rem*, and the owner "may, in defiance of his contract, sell to some third person and give him a perfectly good title, even if that third person had notice of the prior contract."[1] It is necessary also "to point to a distinction, which, although a fine one, seems nevertheless to be a clear one, between contracts which are intended to operate as sales at some future time, and contracts which are intended to operate merely as promises to sell. It is the difference which exists between an agreement that the property shall pass on the happening of some future event without anything further to be done by either party in that behalf, and an agreement by which one party promises that on the happening of some event he will then transfer the property."[2] It is comparable to the difference be-

promissory note because, as the court said, if the consideration perished before maturity, the maker would not be liable. The note was therefore not an absolute promise. A similar decision, based on the same reason, was made in Sloan *v.* McCarty, 134 Mass. 245. On the other hand, in Chicago, &c. Co. *v.* Merchants' Bank, 136 U. S. 268, such a note was held negotiable, and the argument of the Massachusetts cases was expressly denied, the court saying that the maker would be bound to pay the note even though the property for which it was given perished by accident before maturity of the note. Other decisions holding such notes negotiable, and necessarily involving, though not stating, the same conclusion, are Howard *v.* Simpkins, 69 Ga. 773; Mott *v.* Havana Bank, 22 Hun, 354; Heard *v.* Dubuque Bank, 8 Neb. 10; Newton Wagon Co. *v.* Diers, 10 Neb. 284; W. W. Kimball Co. *v.* Mellon, 80 Wis. 133. It was held that such notes were not negotiable, but for reasons not affecting the question under consideration, in Killam *v.* Schoeps, 26 Kan. 310; South Bend Works *v.* Paddock, 37 Kan. 510; Wright *v.* Traver, 73 Mich. 493; Third Bank *v.* Armstrong, 25 Minn. 530; Minneapolis Harvester Works *v.* Hally, 27 Minn. 495; Stevens *v.* Johnson, 28 Minn. 172; Deering *v.* Thom, 29 Minn. 120; (but see Aultman *v.* Olson, 43 Minn. 409); Dominion Bank *v.* Wiggins, 21 Ont. App. 275.

[1] Blackburn, Contract of Sale, 2d ed., p. 244.

[2] *Ibid.*, p. 247. The passage continues: "In the latter case the property does not pass until he does not sell the thing, although the event may have happened, and such a contract at law creates merely a personal obligation to pass the property, and that at law will not create any real right or *jus in rem*. In equity, however, the vendee is in a better position, and such a contract would, when the event had happened, give him a good equitable title to the goods against all persons, excepting any one who, in the mean time and *bona fide*, may have had the property transferred to him." The leading case illustrating the rule in equity is Holroyd *v.* Marshall, 10 H. L. C. 191. See also Collyer *v.* Isaacs, 19 Ch. D. 342; *In re* Clarke, 36 Ch. D. 348; Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352, and other cases therein referred to. In the United States this doctrine of equity is generally followed (Am. & Eng. Cyc. of Law, vol. iii. pp. 183, 184, vol. xxi. p. 472) but not universally. Blanchard *v.* Cooke, 144 Mass. 207. It will be observed that the question can only arise in equity when the contract of sale is one of which equity

tween the present purchase of property in remainder expectant on the death of A., and an executory agreement to purchase the same property upon the death of A. It seems obvious that, in the first class of cases, where the buyer intends the present purchase at the moment of entering into the agreement of a future right, the loss should fall upon the purchaser.[1] A third case arises where the agreement is that the buyer shall at once receive all the incidents of ownership except the bare legal title which is retained as security. It is this last case that is illustrated by a sale with delivery of possession and retention of title till the price is paid. Obviously the buyer has every right of ownership consistent with the seller's retention of security for the price. That security is the measure of the seller's right. The transaction is exactly the same in legal effect as a transfer of title and a mortgage back for the price, and the intent of the parties is the same. No further act on the part of the seller is expected to take place at a future day. By refusing to receive the money due he could not repudiate the transaction, rendering himself liable to a personal action alone.[2] The trans-

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will take cognizance, and that the vendee's equitable title arises at the time when, by agreement, he was to have the legal title.

[1] Dowdy *v.* McLellan, 52 Ga. 408. In this case it was held that the maker of a promissory note given for a reversionary interest in slaves was not relieved from liability by the emancipation of the slaves. Such cases are rare in sales of personal property.

[2] In Carpenter *v.* Scott, 13 R. I. 477, 479, speaking of such a sale, the court said: "Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale. Day *v.* Bassett, 102 Mass. 445, 447; Crompton *v.* Pratt, 105 Mass. 255, 248; Currier *v.* Knapp, 117 Mass. 324, 325, 326; Chase *v.* Ingalls, 122 Mass. 381, 383."

In Chicago Railway Equipment Company *v.* Merchants' Bank, 136 U. S. 268, 283, while referring to notes each of which contained a statement that it was given for personal property the title to which should remain in the payee until the note was paid, Harlan, J, who delivered the opinion of the court, said: "The agreement that the title should remain in the payee until the notes were paid . . . is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. . . . The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee

action is, therefore, rather executed than executory, and, what is the important point, is so regarded by the parties. The loss accordingly should fall on the buyer.

A sale of goods with an option on the part of the buyer to return, as the title and all beneficial interest are transferred, necessarily throws the risk upon the buyer, for the impossibility of performing one half of his alternative promise to return the goods or pay for them cannot excuse non-performance of the other half.[1] On the other hand, when goods are delivered with an option to purchase, as the buyer has never entered into an obligation to buy, the risk necessarily remains with the seller.[2] In England this distinction between a "sale or return" and a "sale on trial," important as it is for the correct decision of many questions, has not been brought out by the decisions.[3]

Still another principle is involved in Smith *v.* Hale, 158 Mass. 178. It was there held that the purchaser of a buggy, the springs of which are warranted, was not precluded from returning it for breach of warranty by the fact that the springs were broken and the buggy was therefore not in the same condition as when it was bought. The decision is correct, for by warranting the springs the seller assumed the risk of injury to them by ordinary use. Had an accidental injury happened to any other part of the buggy, — or indeed to the springs from any other cause than ordinary use, — the loss would, it seems, have fallen upon the purchaser, under the

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had no interest remaining in them except by way of security for the payment of the notes given for the price."

The common statutes requiring a conditional sale, like a chattel mortgage, to be recorded, show a general recognition of the similarity of the two transactions.

[1] See Hotchkiss *v.* Higgins, 52 Conn. 205, and cases cited. Compare Newburger *v.* Hoyt, 86 Ga. 508.

[2] Hunt *v.* Wyman, 100 Mass. 198; Jacob Strauss Saddlery Co. *v.* Kingman, 42 Mo. App. 208.

[3] In Head *v.* Tattersall, L. R. 7 Ex. 7, and in Elphick *v.* Barnes, 5 C. P. D. 321, the buyer was held to be under no obligation to pay the price of a horse which, in the one case had been injured, and in the other case had died. The later case seems to have been a case of sale on trial, but in Head *v.* Tattersall the title was apparently intended to pass at once. In neither case was the point discussed. In Elphick *v.* Barnes, a dictum in Moss *v.* Sweet, 16 Q. B. 493, 495, to the effect that in case of a sale with right to return the risk was on the buyer, was explained away by the suggestion that it only applied where the loss was due to the fault of the buyer. Again, in the Sales of Goods Act, § 18, Rule 4, no distinction is observed. The same rule of presumption is laid down for a "sale or return" and a "sale on approval." Chalmers in his annotation of the act, however, points out the distinction p. 42. The cases in this country are collected in Benjamin, Sales (Am. ed. 1892), pp. 568, 569.

principles discussed in the last paragraph, even though the warranty had in fact been broken.[1]

The development of the law in regard to risk of real property under contract of sale has been entirely apart from the law governing sales of chattels, and has taken place in courts of equity rather than courts of law. The matter was first touched upon by Sir Joseph Jekyll, M. R., who said, "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house."[2]

The leading case on the subject is Paine *v.* Meller,[3] a decision by Lord Eldon. This was a suit for specific performance. The contract was made on September 1 for a conveyance at Michaelmas. Owing to the seller's failure to make out a good title, the conveyance was not made then, but on December 16th or 17th the parties continued treating with each other, and there was evidence that the defect in the title was remedied to the buyer's satisfaction. On December 18th the house was burned. Lord Eldon held that if the buyer had accepted the title he was bound to complete the purchase, but otherwise not. The case is generally cited as a decision that the buyer is liable from the date of the contract, and it seems that such is the effect of it, though it has been cited also as

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[1] See McKnight *v.* Nichols, 147 Pa. 158.

[2] Stent *v.* Bailis, 2 P. Wms. 217, 220. The case of Cass *v.* Rudele, 2 Vernon, 280, s. c. Eq. Cas. Ab. 25, pl. 8, is not in point, because according to the reports the houses in question were destroyed after the purchaser was in default, and, according to a note in the latter report, after conveyance. There is also a whole series of cases which should be distinguished. White *v.* Nutt, 1 P. Wms. 61, may be taken as an instance. That was a suit to enforce a contract to purchase an estate for two lives. Before the time for conveyance one of the lives determined. Specific performance was decreed. This clearly follows from the nature of the contract. The contingency the happening of which lessened the value of the estate was an ordinary one necessarily in the contemplation of the parties. An agreement for the purchase of an annuity is subject to a similar risk. Mortimer *v.* Capper, 1 Bro. C. C. 156. Cf. Pope *v.* Roots, 1 Bro. P. C. 370. On the same principle, the case of Akhurst *v.* Jackson, 1 Swanst. 85, is entirely right. There a trader agreed to take two persons in partnership for a period of eighteen years, in consideration of a sum payable in several instalments. Five months later, when only one instalment had become due, the trader became bankrupt. It was held that his assignees were entitled to recover the remaining instalments when they became due. Such cases do not differ in principle from appreciation or depreciation in the market value of property between the days of contract and conveyance, and do not fall properly within the subject of this article, which relates to risks not only accidental, but extraordinary.

[3] 6 Ves. 349.

deciding the contrary.[1] As the time for performance had passed, owing to the seller's default, the buyer could clearly not be compelled to take the property unless this default was waived, and it was for this reason that Lord Eldon made the question turn on the acceptance of the title. His language makes his view clear: "As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be assets; and they would descend to his heir."

Since the decision of Paine *v.* Meller it has not been doubted in England that the buyer is not excused from fulfilling his promise to purchase by an accidental injury to the property.[2] It is not surprising that the English law has had a marked effect upon the decisions in this country. A majority of the courts which have dealt with the subject have, either in dicta or decisions,[3] indicated

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[1] A Brief Survey of Equity Jurisdiction, C. C. Langdell, 1 HARVARD LAW REVIEW, 375, note 1. "Lord Eldon held that the vendee must bear the loss, provided he had been put in default by the vendor before the loss happened, but not otherwise." The vendee could hardly be considered in default on any view. Though it rested with him to make the deeds, he would certainly not be in default immediately upon expressing himself as satisfied with the title. He would have a reasonable time thereafter to prepare the deeds, and in fact it was said when the title was accepted that the deeds would be ready in two or three days, a time which had not expired at the time of the fire.

[2] There are dicta to this effect in Rawlins *v.* Burgis, 2 Ves. & B. 382, 387; Harford *v.* Purrier, 1 Mad. 532, 539; Acland *v.* Gaisford, 2 Mad. 28, 32; Robertson *v.* Skelton, 12 Beav. 260, 266; Coles *v.* Bristowe, L. R. 6 Eq. 149, 159, 160. In Poole *v.* Adams, 12 Weekly Rep. 683, Kindersley held, at suit of a *cestui que trust*, that a vendee from the plaintiff's trustee was bound to pay the price for an estate though the house had been destroyed, and could not claim the benefit of insurance money collected by the trustee and under agreement with the vendee allowed as part payment of the price, the trustee having misapplied the insurance money and become bankrupt. In Rayner *v.* Preston, 14 Ch. D. 297, it was held that a vendee of a house who after its destruction by fire before the time fixed for conveyance had paid the price in full, could not recover insurance money collected by the vendor. This decision was affirmed by the Court of Appeal, Brett and Cotton, L. JJ., James, L. J., dissenting. Thereafter in Castellain *v.* Preston, 8 Q. B. D. 613, 11 Q. B. D. 380, the Court of Appeal, reversing the decision of Chitty, J., unanimously held the insurers entitled to recover back the insurance money paid, on the ground that it was paid in ignorance of the fact that the vendee had previously paid the price in full. In both cases all the judges recognized the doctrine of Paine *v.* Meller.

[3] Osborn *v.* Nicholson, 13 Wall. 654, 660 (but see The Tornado, 108 U. S. 342, 352, where Wells *v.* Calnan, 107 Mass. 514, was cited with approval); Willis *v.* Wozencraft, 22 Cal. 607, 618; Hough *v.* City Fire Ins. Co., 29 Conn. 10; Lombard *v.* Chicago Sinai Cong., 64 Ill. 477, 482; Kuhn *v.* Freeman, 15 Kan. 423; Gammon *v.* Blaisdell, 45 Kan. 221; Johnston *v.* Jones, 12 B. Mon. 326; Calhoon *v.* Belden, 3 Bush, 674; Marks *v.*

their assent to Lord Eldon's view. But there is, nevertheless, a strong dissent.[1]

The reason stated in the case for what may be called the English view is variously put. It is sometimes said that equity regards as done what is agreed to be done; sometimes that from the moment of the contract the vendor is trustee for the vendee; sometimes that from that moment the vendee is the owner in equity. So far as these statements are not question-begging ways of saying the law is so because it is, they involve the idea that the vendee from the time of the contract acquires the substantial rights of ownership, and will therefore be treated by equity as having the rights and being subject to the liabilities of a legal owner. There are reasons for this theory when applied to real estate not applicable to chattels. That a contract to sell chattels without transfer of possession gives only a personal right against the seller for damages in case of breach has already been shown. A contract to sell real estate, however, may be specifically enforced against the vendor; and not only against the vendor, but against any one who, with notice of the vendee's rights, takes title from the vendor. In this country, moreover, by recording his contract, the vendee is able to charge every one with constructive notice of his rights. He thus acquires in fact a right *in rem*.[2] This effect of the

Tichenor, 85 Ky. 536; Martin *v.* Carver's Adm. (Ky.) 1 S. W. Rep. 199; Brewer *v.* Herbert, 30 Md. 301; Blew *v.* McClelland, 29 Mo. 304, 306; Snyder *v.* Murdock, 51 Mo. 175, 177; Walker *v.* Owen, 79 Mo. 563; Gilbert *v.* Port, 28 Ohio St. 276, 292; Richter *v.* Selin, 8 S. & R. 425, 440; Morgan *v.* Scott, 26 Pa. 51; Siter's App., 26 Pa. 178, 180; Reed *v.* Lukens, 44 Pa. 200; Hill *v.* Cumberland Co., 59 Pa. 474, 478; Miller *v.* Zufall, 113 Pa. 317, 325; Huguenin *v.* Courtenay, 21 S. C. 403, 405; Christian *v.* Cabell, 22 Gratt. 82, 105. A decision to the same effect in Australia is Smith *v.* Hayles, 3 Victorian L. R. Law, 237.

[1] Cutcliff *v.* McAnally, 88 Ala. 507, 512; Gould *v.* Murch, 70 Me. 288; Thompson *v.* Gould, 20 Pick. 134; Gould *v.* Thompson, 4 Met. 224; Wells *v.* Calnan, 107 Mass. 514; Wilson *v.* Clark, 60 N. H. 352; Powell *v.* Dayton, &c. R. R. Co., 12 Ore. 488. The question is expressly left open in Wetzler *v.* Duffy, 78 Wis. 170. In New York there are dicta in a few early cases in accord with the English law, Rood *v.* New York, &c. Co., 18 Barb. 80, 83; McKechnie *v.* Sterling, 48 Barb. 330, 335; Clinton v. Hope Ins. Co., 45 N. Y. 454, 465; but in view of the later decisions it seems probable that the vendee would not be bound to fulfil his contract if the property were accidentally destroyed or seriously injured before the time for the completion of the contract, unless he had by the contract a right to the possession of the premises. Wicks *v.* Bowman, 5 Daly, 225; Smith *v.* McCluskey, 45 Barb. 610; Goldman *v.* Rosenberg, 116 N. Y. 78; Listman *v.* Hickey, 65 Hun, 8.

[2] Another instance of the same effect of the system of registration is found in the law of equitable easements. In this country, as every one has constructive notice of a recorded equitable easement, such an easement is as completely a right *in rem* as a legal easement, which also only becomes a right *in rem* when recorded.

registration laws has never been adverted to in connection with the question under discussion, but it seems obvious that the right of the vendee between the time of the contract and the time for performance corresponds more nearly to actual ownership where such laws prevail than where they do not.

If the promise of the vendee is expressly conditional upon receiving a conveyance of the property in good condition, it can hardly be doubted that no liability will arise unless the condition is complied with. If there is no express condition to the vendee's promise, but an express promise by the vendor to convey and deliver in good condition, it is held in Kentucky that failure to comply with the promise, though excused by impossibility, will prevent any right of action for the price.[1] Reasonable as this doctrine seems, it leads to the destruction of the whole English rule, for a promise to convey must always mean a promise to convey in substantially the same condition as at the time of the contract.

On any view, too, the vendor is not entitled to the price unless at the time of the calamity the obligation of the vendee to take the property was absolute. If, therefore, the vendor had not at that time a good title,[2] or was in default,[3] or if either the vendor or the vendee had any option in regard to performance of the contract,[4]

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[1] Marks *v.* Tichenor, 85 Ky. 536, 538. Indeed, it has been held in Indiana that such a promise binds the promisor to pay damages. Goddard *v.* Bebout, 40 Ind. 114. But see Maggort *v.* Hansbarger, 8 Leigh, 532; Warner *v.* Hitchins, 5 Barb. 666; Young *v.* Leary, 135 N. Y. 569. Similarly, a promise to return leased personal property in good condition has been held to amount to an assumption of the risk. Harvey *v.* Murray, 136 Mass. 377. It may be doubted whether this is the true construction of the promise. The contrary decisions of Seevers *v.* Gabel (Ia.), 62 N. W. Rep. 669; Young *v.* Bruces, 5 Litt. 324; McEvers *v.* The Sangamon, 22 Mo. 187; and Harris *v.* Nicholas, 5 Munf. 483, seem better.

[2] Paine *v.* Meller, 6 Ves. 349; Calhoon *v.* Belden, 3 Bush, 674; Christian *v.* Cabell, 22 Gratt. 82.

[3] Paine *v.* Meller, 6 Ves. 349.

[4] Counter *v.* Macpherson, 5 Moo. P. C. 83; Lombard *v.* Chicago Sinai Cong., 64 Ill. 477; Blew *v.* McClelland, 29 Mo. 304; Gilbert *v.* Port, 28 Ohio St. 276. On this principle the decision in Goldman *v.* Rosenberg, 116 N. Y. 78, would clearly have been the same had the court admitted the general doctrine of the English courts of equity. One partner had conveyed real estate to a firm of which he was a member, agreeing to purchase it on the expiration of the partnership. As the property was at the risk of the business, the right of the vendee was subject to a contingency. For the same reason, a judicial sale does not throw the risk on the vendor until the sale is confirmed, for though the vendee is bound before that time, the vendor is not, since the court may refuse to confirm the sale. *Ex parte* Minor, 11 Ves. 559; Twigg *v.* Fifield, 13 Ves. 517.

the loss falls upon the vendor. So too if the loss was due to the vendor's own negligence.[1]

It has not been considered whether partial destruction of an estate stands on any different footing from total destruction, but no such distinction seems tenable. On any true construction of a promise to convey an estate, the promise is no more fulfilled by conveying the land without the house than by conveying nothing. And any reasoning which requires the vendee to pay when the vendor materially though excusably fails to fulfil his promise must require payment when the vendor totally and equally excusably fails to perform. In a Kansas decision[2] the question of total destruction seems involved. In that case the estate was taken by eminent domain so that the vendor could convey nothing at all. It was held that the vendee must pay the price, becoming thereby of course entitled to the damages payable on account of the taking.

In jurisdictions at least where equitable defences and replications are allowed at law, there should be no difference in the effect of a decision on this point by a court of law and a decision of a court of equity. If the promise of the buyer is made expressly conditional on receiving the property in good order, a court of equity can disregard the expressed intent of the parties no more than a court of law. On the other hand, if the promise of the buyer is in terms absolute, this promise should not be held in a court of law subject to an implied condition of performance by the seller, if the contrary is held by a court of equity. The basis of implied conditions is that there is a failure of the consideration for a promise if the performance promised in return is not given. Whether there has been such a failure of consideration is a question which should be decided in the same way by a court of law and a court of equity. If it is proper for a court of equity to hold that a vendee before conveyance is in the owner in equity and hence liable for the price, a court of law should hold either that there are no implied conditions that the legal title to the property shall be transferred, and that the property shall be in substantially the same state, or that, if there are such conditions, accidental destruction or injury of the property is an excuse for non-performance. In fact, though most of the decisions holding the vendee not liable have been made by courts of law, and all the contrary decisions by courts of equity or by courts administering both law and equity, it is not probable that

[1] Marks *v.* Tichenor, 85 Ky. 536, 538. [2] Gammon *v.* Blaisdell, 45 Kan. 221.

the result of the former cases at least would have been different had the proceedings been in equity. It is nearly certain that the courts of Massachusetts, Maine, and New Hampshire would give vendors no more relief in equity than at law.[1]

In support of the proposition forcibly stated by Lord Eldon, "The estate from the sealing of the contract is the real property of the vendee,"[2] it is pointed out that from that time the property may be conveyed or devised as real estate by the vendee,[3] that it will pass to his heir,[4] that his widow will get dower if dower in equitable estates is allowed,[5] that his family may acquire rights of homestead at once,[6] that the vendor if still in possession must take reasonable care of the property and is liable for waste,[7] that the vendor's creditors cannot reach the real estate,[8] that on the other hand the vendor's interest is immediately treated as personalty[9] and passes to his executors, his wife not having dower,[10] that under the old English law the contract was in equity regarded as a revocation of a prior devise,[11] and under the modern English and Ameri-

[1] In Poole *v.* Adams, 12 W. R. 683, Kindersley, V. C., said: "Whatever the rule of this court might be as to enforcing specific performance in a case where the property was burnt down, it was clear that the contract remained good at law, and that the purchaser might have been sued for breach in refusing to complete and pay his purchase money." This is not the usual line of argument, however.

[2] Seton *v.* Slade, 7 Ves. 265, 274.

[3] The vendee's interest was held to pass under a devise of the testator's freehold estate. Greenhill *v.* Greenhill, 2 Vern. 679; Prec. Ch. 320. See also Langford *v.* Pitt, 2 P. Wms. 629.

[4] Langford *v.* Pitt, 2 P. Wms. 629; Seton *v.* Slade, 7 Ves. 265, 274; Musham *v.* Musham, 87 Ill. 80; Champion *v.* Brown, 6 Johns. Ch. 398; Hathaway *v.* Payne, 34 N. Y. 92, 103; Thomson *v.* Smith, 63 N. Y. 301, 303.

[5] Bailey *v.* Duncan's Repr., 4 Mon. 256; Rowton *v.* Rowton, 1 Hen. & Munf. 92.

[6] Chopin *v.* Runte, 75 Wis. 361. In this case the vendee had possession, and it may be doubted whether the same result would otherwise have been reached.

[7] Phillips *v.* Silvester, L. R. 8 Ch. 173; Earl of Egmont *v.* Smith, 6 Ch. D. 469; Royal Society *v.* Bomash, 35 Ch. D. 390; Clarke *v* Ramuz [1891], 2 Q. B. 456; Holmberg *v.* Johnson, 45 Kan. 197. Compare Hellreigel *v.* Manning, 97 N. Y. 56. See also Dart, Vendors and Purchasers (6th ed.), 733; Cloyd *v.* Steiger, 139 Ill. 41.

[8] Finch *v.* Earl of Winchelsea, 1 P. Wms. 277; Jackson *v.* Snell, 34 Ind. 241; Hampson *v.* Edelen, 2 Har. & J. 64; Houston *v.* Nowland, 7 G. & J. 480; Lane *v.* Ludlow, 6 Paige, 316, *n.*; Moyer *v.* Hinman, 13 N. Y. 180, 190; Siter's Appeal, 26 Pa. 178; Blackmer *v.* Phillips, 67 N. C 340.

[9] Curre *v.* Bowyer, 5 Beav. 6, *n.* (*b*); Thomas *v.* Howell, 34 Ch. D. 166; Moore *v.* Burrows, 34 Barb. 173; Smith *v.* Gage, 41 Barb. 60; Thomson *v.* Smith, 63 N. Y. 301, 303; Keep *v.* Miller, 42 N. J. Eq. 100; Kerr *v.* Day, 14 Pa. St. 112, 114. And see a valuable note in 42 N. J. Eq. 100.

[10] Lunsford *v.* Jarrett, 11 Lea, 192, 196.

[11] Cotter *v.* Layer, 2 P. Wms. 623; Knollys *v.* Alcock, 5 Ves. 648, 654; Bennett *v.* Lord Tankerville, 19 Ves. 170, 178; Farrar *v.* Earl of Winterton, 5 Beav. 1; *Re* Manchester Co., 19 Beav. 365.

can law the devisee or heir being compelled to convey to the purchaser, though the price is paid to personal representatives,[1] that in insurance law the vendee is regarded as the owner,[2] and finally in a multitude of cases the vendor is said to be trustee for the vendee.[3]

Most of these decisions are entirely explicable on the ground of equitable conversion. The vendor has indicated an intent to convert his real estate into personalty, and the vendee an intent to convert personal estate into real estate, and there is no reason why the intent should not be regarded. The question is not ordinarily at what time the conversion is to be dated, but whether there is any conversion. Where the former question arises, it is noticeable that the profits of land under contract of sale belong to the vendor's heir until the day fixed for conveyance.[4] Unquestionably the vendee has an interest in the property which equity will and should protect by enjoining if necessary any dealing with the property inconsistent with the contract. It should be equally clear that the vendor has likewise an interest in the property, and, if the vendee is in possession, he also may be enjoined from committing waste.[5] Many of the insurance cases seem inexplicable on any view, and it is not true that the vendor is trustee for the vendee,[6] and this is

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[1] Watson *v.* Mahan, 20 Ind. 223; Judd *v.* Mosely, 30 Ia. 423; Newton *v.* Swazey, 8 N. H. 9; Moore *v.* Burrows, 34 Barb. 173; Newport Waterworks *v.* Sisson (R. I.), 28 At. Rep. 336.

[2] A policy of insurance issued to the vendee was held valid, though the policy was conditioned to be void unless the insured had the entire, unconditional, and sole ownership. Rumsey *v.* Phœnix Ins. Co., 17 Blatch. 527; Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; Pelton *v.* Westchester Fire Ins. Co., 77 N. Y. 605; Millville Fire Ins. Co. *v.* Wilgus, 88 Pa. 107; Imperial Fire Ins. Co. *v.* Dunham, 117 Pa. 460; Elliott *v.* Ashland Mut. Ins. Co., 117 Pa. 548. See also Hough *v.* City Ins. Co., 29 Conn. 10. And see Biddle on Insurance, § 686. But in all these cases the vendee had possession, and this is strongly relied on as a ground of decision.

[3] See notes 7 and 8, *infra.*

[4] Lumsden *v.* Fraser, 12 Sim. 263.

[5] Moses *v.* Johnson, 88 Ala. 517; Miller *v.* Waddingham, 91 Cal. 377.

[6] "An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser." Rayner *v.* Preston, 18 Ch. D. 1, 6, per Cotton, L. J.

"With the greatest deference it seems wrong to say that one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on

occasionally recognized, yet the courts continue the use of this misleading word.[1]

In determining the propriety of throwing the risk on the purchaser from the date of the contract, the primary question is not, it should be observed, whether the vendor or the vendee may be called owner with the greater propriety pending performance of the contract, still less whether the vendee may be called owner in equity and the vendor a trustee. The vendee, when sued, is sued on a promise to pay money. This promise he gave in return for a counter promise. Unless a fundamental principle of the law of

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two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide, at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due, and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a court of equity will under certain circumstances decree a specific performance." Rayner *v.* Preston, 18 Ch. D. 1, 18, per Brett, L. J. See also criticism of this use of the word trustee in 36 Sol. Journal, 775 and 784. It has been suggested that when the purchase-money has been paid the vendor may be properly called a trustee. 2 HARVARD LAW REVIEW, 421. It is submitted that even then the vendor is not a bare trustee for the vendee, unless by the contract the vendee is entitled to immediate possession. And except in that case the risk should remain with the seller. Of course where the price is paid the vendee is ordinarily entitled to immediate possession, but this is not necessarily the case.

[1] In Royal Society *v.* Bomash, 35 Ch. D. 390, 397, Kekewich, J., says: "Of course we all know that he is only a trustee in a modified sense. There are many things to be done before he becomes a mere trustee; but still Lord Selborne (in Phillips *v.* Silvester, L. R. 8 Ch. 173, 177) says he is a trustee, and I have no doubt that that is the right position, and I so decide."

It would seem that a trustee only in a modified sense would better be called by some other name, — the name of vendor, for instance.

How little weight is to be given to the loose language used in this matter is shown by the fact that it is common to find it also said that the vendee is trustee of the purchase money, or the vendor is owner of it in equity. Two recent illustrations of this in quarters where it might not have been expected may be found in Cross v. Bean, 83 Me. 61, 64, and in Pomeroy's Equity Jurisprudence, § 368. And see Fry, Spec. Perf. (3d ed.), § 1396. In Maine, though it is said in Cross *v.* Bean that vendor and vendee are trustees for each other, it is also held in the strongest way that the risk is on the vendee. Gould *v.* Murch, 70 Me. 288.

contracts — a principle founded on natural justice — is to be set aside, the vendee cannot be called upon to perform his promise unless the vendor performs his counter promise, in substance at least, and it matters not that non-performance of the counter promise is excused by the impossibility of performance.[1] The vendor contracted to give a complete legal title, with all which that implies, — the right to dispose of the property, *jus disponendi*, and the right of present enjoyment thereof, *jus fruendi*. Unless the vendee acquires by the contract itself substantially this, it is at variance with sound legal principles to hold him liable on his own promise after destruction of the premises. It does not advance the argument to discuss equitable ownership unless it be also considered how far that is the equivalent of the legal ownership for which the vendor contracted. In the United States, at least, the vendee does by the contract itself, as soon as it is recorded, acquire the full *jus disponendi*, the substantial equivalent of a legal reversionary interest from the time when performance is due. In England he does not get nearly as much as this, for the vendor may by selling to a *bona fide* purchaser for value without notice deprive the vendee of all right to the property. If the vendor wishes to do this, it is perfectly easy for him to do it. The vendee's right, therefore, is wholly dependent on the honesty of the vendor. Such a right is not the substantial equivalent of a legal title. Moreover, neither in the United States nor in this country does the vendee acquire by the contract the second great incident of ownership, — the right of present enjoyment. This may be a matter of great importance. If the contract is to convey at a day far in the future, it seems impossible to say in any sense that the vendor receives at the moment of the contract the equivalent of what he bargained for. If the day fixed for conveyance is near at hand, it is true, the possession is of less importance, but it is still to be considered, and a rule which is laid down as a general one must be able to stand the strain of hard cases.

Though the arguments presented in the preceding paragraph are important, they do not touch the fundamental difficulty with the English rule, which is, that, whatever rights a vendee may acquire immediately after the contract, and even if such rights were the substantial equivalent of a legal title, the contract is for the

[1] Taylor *v.* Caldwell, 3 B. & S. 826; Jackson *v.* Union Marine Ins. Co., L. R. 10 C. P. 125; Poussard *v.* Spiers, 1 Q. B. D. 410; Greene *v.* Linton, 7 Porter, 133; Remy *v.* Olds (Cal.), 34 Pac. Rep. 216; Johnson *v.* Walker, 155 Mass. 253.

transfer of title at a future day. It is only by the transfer at that time that such a contract is fulfilled. Of course, voluntary acceptance of a proffered equivalent at an earlier day would be sufficient to bind the vendee; but where the original intention of the parties to transfer ownership from one to the other at a future day has never been changed, nothing but transfer at that day is a fulfilment of the contract. It should be obvious that a present purchase of the reversion of an estate is a different thing from an executory contract to purchase an estate at a future day. It should be obvious that the intention of the parties is different in the two cases. It is, therefore, in clear disregard of the intention of the parties to hold that, since a court of equity assures to the purchaser in the latter case, to a greater or less extent, a right substantially equivalent to that secured by the purchaser, of a legal future estate, the loss should be similarly adjusted. The intention of the parties is the chief factor in any proper decision. It would be universally admitted that, if the contract expressly provided that the risk should be with one party or the other, this provision would be of controlling force. Parties do not frequently make such express provisions, but they do indicate whether they intend a present transfer of the rights of ownership or a future transfer, and there should be no doubt that they expect all the incidents of ownership, including risk to pass from the seller to the buyer at that time. That time will frequently not be when the legal title is transferred. If, as frequently happens, a purchaser is given immediate possession under his contract, the title is retained merely as security for payment of the price. It is a short way of accomplishing the same end as would be achieved by conveying to the purchaser and taking a mortgage back, as was suggested in regard to similar transactions in sales of personal property. When by the contract the beneficial incidents of ownership are to pass is the time which the parties must regard as the moment of the transfer.

How little the intention of the parties is regarded by the English rule may be seen by comparing a contract to sell a carriage-horse at the end of the season and a contract to sell a race-horse at the end of the season. Equity would grant specific performance of the latter contract, and hence, while the seller sends the animal over the country to race for his own benefit, he would, according to the English rule, do so at the risk of the buyer.[1] The carriage-

[1] No cases seem to have arisen in regard to risk under contracts for the sale of personal property of such a character that the contract would be specifically enforced, but

horse, on the other hand, would remain at the risk of the seller till the end of the season. Surely the intention of the parties as to the time of transfer is the same in both cases. If it be suggested that in both cases the parties contemplate an immediate transfer of ownership, but that in the case of the carriage-horse equity cannot effectuate this intention, in the case of the race-horse it can, the answer is, that if the parties meant a present transfer and lease back during the season they would say so. It would be perfectly easy to express such an intention, and in the case of personalty the intention, if expressed, would be perfectly effectual without any formality.

In truth, the argument for throwing the loss upon the purchaser in an executory contract of sale where possession is not given to the purchaser cannot be put more strongly than this. Equity gives to the vendee, whatever his intention, assurance far greater than a court of law can give, that the specific subject of the sale will become his, and, if not at the time fixed by the contract, yet with damages sufficient to pay for the delay. In return for this assurance equity demands as a price that the vendee take the risks of accidental loss. The propriety of such a requirement depends on the answer to three questions: Is it in accordance with natural justice? Is it of practical advantage? Is it in conformity with the principles of law in analogous cases?

Views of natural justice vary so much that it is not very profitable to discuss the topic, but certainly in dealing with contracts no general rule can be more just than to aim to follow the intention of the parties, and therefore to throw the loss on the vendee if the parties intend a present transfer, on the vendor if they intend a future transfer.[1]

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no possible theory can be suggested for distinguishing such a contract in this connection from a contract to sell real estate.

[1] It is frequently suggested that, as the vendee gets the benefit of any chance improvement of the property, he should therefore suffer for a chance loss. There are several answers to this. In the first place, it proves too much, for it is as applicable to personal property as to real property. In the second place, there are practically no chance improvements analogous to chance destruction. In the third place, it is not certain that the vendee would get the benefit of an advantageous change in the property of such a character as to alter its nature, whether the subject of the sale were realty or personalty. A few analogies suggest themselves. In the case of accession, where the nature of property has been changed by work done upon it, if there has been no wilful conversion, the owner loses his right to the property itself and has only a right to its money value in its original form. Gray's Cases on Property, vol. i. pp. 65–104. It is true that in such cases the increased value is due, not to chance, but to

The practical advantages of leaving the risk with the vendor until transfer of possession are obvious. In the first place, it is better in a doubtful case to let a loss lie where it falls. It saves litigation. More important than this principle is the consideration that it is wiser to have the party in possession of property care for it at his peril, rather than at the peril of another. Of course, if the vendor in possession is negligent, and owing to his negligence the property is injured or destroyed, as matter of law the loss is his on any view, but there may be a great difference between not being so negligent as to be liable, and taking such care as would be induced by a great personal stake in the consequences. Then, too, negligence of a vendor in possession is a very difficult thing to prove, and the burden of proving it under the English rule is upon the vendee. A further consideration is the arrangement of the insurance. If the contract immediately throws the risk on the vendee, it practically removes it from an insurer of the property, for the vendor's insurable interest becomes only that of a mortgagee; so that, even if the insurer were forced to pay the vendor, he would be subrogated to the claim of the latter against the vendee. This can hardly be thought a happy result, yet it is one likely to happen after any contract of sale. The vendor ordinarily has insurance at the time of the contract. The vendee can have none, for till after that time he has no insurable interest. In fact, the vendee relies on the vendor's insurance as a protection to the

work of the defendant or some one from whom he claims. Nevertheless, the fact remains that the plaintiff had a right to a specific thing against one in possession of it, and lost that right because of the change in its nature and value, and it is this change which is the gist of the defence. On the other hand, it may be suggested that the young of animals which the owner had contracted to sell would presumably pass to the buyer, *partus sequitur ventrem*. Santos *v.* Illidge, 6 C. B. N. S. 841, 852; Buckmaster *v.* Smith, 22 Vt. 203; Clark *v.* Hayward, 51 Vt. 14. But in case of an agreement to sell a specific animal, or perhaps even a herd, at a future day, this is open to doubt. If the buyer was held entitled to the young, it would be because of a maxim in the Roman law, which, as it threw all risks on the buyer, necessarily gave him all profits. Moreover, the maxim related primarily to status rather than title. In 2 Kent's Com. 361, the learned author says: "If a person hires for a limited period a flock of sheep or cattle of the owner, the increase of the flock during the term belongs to the usufructuary, who is regarded as temporary proprietor. This general principle of law was admitted in Wood *v.* Ash, Owen, 139, and recognized in Putnam *v.* Wyley, 8 Johns. 432." One who agrees to sell at a future day, retaining in the mean time the *jus fruendi*, should have rights at least equal to a lessee. The case of dividends on shares of stock declared between the day of a contract to sell and the time for delivery or transfer may also be suggested. But dividends are not extraordinary accidental accessions. They are normal incidents, analogous to rents and profits of real estate. To some extent the same may be said of the increase of animals.

property. Even if, as is not infrequently provided, the vendor's insurance is by agreement to be assigned to the vendee when the property is transferred, or to be held for his benefit in the mean time, either the vendor or the vendee is not protected by the English law.[1]

Finally, the doctrine of equity here criticised does not follow the analogy of cases indistinguishable on principle.

In Taylor *v.* Caldwell,[2] the plaintiff had contracted with the defendant for the hire of a music hall for several specified days. The hall was burned before the time. The action was brought against the owner for damages. The trial court directed a verdict for the plaintiff, but a rule to enter a verdict for the defendant was made absolute. Blackburn, J., at the end of an elaborate opinion, said: "We think, therefore, that the music hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and gardens and other things."[3] It is true the agreement could not have been specifically enforced as a whole, because the defendant had agreed to provide certain things necessary for the proposed entertainments besides the hall; but the principle is stated as a general one, and the case has become a leading authority for similar cases. It has not been suggested that the principle does not apply to a contract that might have been specifically enforced owing to the nature of the property to which it related.

The decisions in regard to interest on the purchase money and the rents and profits of the land are inconsistent both with the doctrine that the contract itself makes the vendee owner in equity, and with the doctrine that the vendor is invariably to be regarded as the owner until the transfer of the legal title.

It is well settled that the vendor is not entitled to immediate

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[1] "The common practice of inserting in conditions of sale that the purchaser shall have the benefit of any insurance effected by the vendor exposes the vendor to the danger of having to hand over the insurance money to the purchaser, and at the same time of being liable to the insurance company for an equivalent amount of his purchase money." Dart, Vendors and Purchasers (6th ed.), p. 913; see also p. 197. The purchaser is not, without agreement, entitled to the insurance of the vendor. Poole *v.* Adams, 12 W. R. 683; Rayner *v.* Preston, 18 Ch. D. 1; King *v.* Preston, 11 La. An. 95; Clinton *v.* Hope Ins. Co., 45 N. Y. 454, 465. Gilbert *v.* Port, 28 Ohio St. 276; Reed *v.* Lukens, 44 Pa. 200, *contra*. See also Hill *v.* Cumberland Valley Co., 59 Pa. 474; Parcell *v.* Grosser, 109 Pa. 617.

[2] 3 B. & S. 826.

[3] Page, 840.

possession, unless the contract expressly provides that he shall have it; [1] nor is he entitled to the rents and profits until the time when he is entitled to possession.[2] This cannot be reconciled with immediate ownership on the part of the vendee. Where the contract specifies a fixed day for the transfer of title, it might be contended that the intent of the contracting parties was thereby indicated, that the vendee should retain the possession and rents and profits till that day. But the law is, presumably, the same whether a day is or is not fixed by the contract for performance,[3] and no argument can be convincing of the propriety of asserting that the vendor is an owner from the making of the contract, and yet is not entitled to the rights of an owner though he has not agreed to surrender them. If an intent is manifest that the vendee shall not have possession or rents and profits, an intent is equally manifest that he shall have no other right or consequence of ownership.

On the other hand, from the time when the vendee is entitled by the contract to possession, he is entitled to the rights of an owner. The vendor, if still in possession, must account for the rents and profits,[4] and the vendee must pay interest on the price.[5] This rule shows that interest on the purchase money and rents and

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[1] Clarke *v.* Ramuz, [1891] 2 Q. B. 456, 463; Gaven *v.* Hagen, 15 Cal. 208; Gates *v.* McLean, 70 Cal. 42; Stratton *v.* California Land Co., 86 Cal. 353; Williams *v.* Forbes, 47 Ill. 148; Chappell *v.* McKnight, 108 Ill. 570; Druse *v.* Wheeler, 22 Mich. 439; Cartin *v.* Hammond, 10 Mont. 1; Suffern *v.* Townsend, 9 Johns. 35; Erwin *v.* Olmsted, 7 Cow. 229; Spencer *v.* Tobey, 22 Barb. 260, 269; Burnett *v.* Caldwell, 9 Wall. 290, 293. The law in Alabama is otherwise, Reid *v.* Davis, 4 Ala. 83; Wimbish *v.* Montgomery, &c. Assoc., 69 Ala. 575, 578. It has been held in two cases that if the price has been paid and the land is vacant the purchaser is entitled to possession. Miller *v.* Ball, 64 N. Y. 286; Sherman *v.* Savery, 2 Fed. Rep. 505.

[2] Mackrell *v.* Hunt, 2 Mad. 34 *n.*; Rayner *v.* Preston, 18 Ch. D. 1, 11. See also the cases cited in note 4, *infra*. The same principle is also involved in the cases in the preceding note. Compare Ashurst *v.* Peck (Ala.), 14 South. Rep. 541, Hundley *v.* Lyons, 5 Munf. 342.

[3] See, however, Hundley *v.* Lyons, 5 Munf. 342.

[4] Acland *v.* Gaisford, 2 Mad. 28; Wilson *v.* Clapham, 1 J. & W. 36; Mason *v.* Chambers, 3 T. B. Mon. 318; Baxter *v.* Brand, 6 Dana, 296; Hundley *v.* Lyons, 5 Munf. 342; Dart, Vendors and Purchasers (6th ed.), pp. 286, 505, 708, 732.

[5] Powell *v.* Martyr, 8 Ves. 146; Fludyer *v.* Cocker, 12 Ves. 25; Roberts *v.* Massey, 13 Ves. 561; Birch *v.* Joy, 3 H. L. C. 565; Ballard *v.* Shutt, 15 Ch. D. 122; Cullum v. Branch Bank, 4 Ala. 21; Boyce *v.* Pritchett's Heirs, 6 Dana, 231; Bishop *v.* Clark, 82 Me. 532; Cleveland *v.* Burrill, 25 Barb. 532; Stevenson *v.* Maxwell, 2 Comst. 408; Ramsay *v.* Brailsford, 2 Desaus. 582, 592; Hundley *v.* Lyons, 5 Munf. 342; Selden *v.* James, 6 Rand. 464. A qualification is added in the English cases which would probably meet with general assent, that if the vendee's money is lying idle ready for the vendor, and the vendor has notice of this, interest will cease.

profits are not regarded as equivalent to each other, and therefore that an exchange of them is unnecessary. Further, a vendee in possession has every right of ownership not inconsistent with the security of the vendor,[1] and if the vendor intermeddle with the property he is a trespasser.[2] Until possession or the time when possession should be transferred, therefore, under these decisions, the vendor is treated as the owner, and thereafter the vendee is so regarded.[3]

It is instructive to consider in this connection also the law in regard to leased property. By the early English law it seems clear that even a partial destruction of leased property abated a reserved rent or a part of it proportioned to the injury to the premises.[4] But

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[1] Miller *v.* Waddingham, 91 Cal. 377; Baker *v.* Bishop Hill Colony, 45 Ill. 264; Baldwin *v.* Pool, 74 Ill. 97; Dart, Vendors and Purchasers (6th ed.), 289.

[2] Smith *v.* Price, 42 Ill. 399.

[3] It may be thought that the rule in regard to rents and profits of real estate is inconsistent with the rule in regard to dividends and calls upon stock after a contract for the sale of stock. It is sometimes said that after such a contract the purchaser is entitled to dividends and must pay calls. In the first place, it is to be noticed that in contracts to sell stock it is generally not specific stock which is the subject of the bargain, but any stock which answers a particular description, and it has not been suggested that it makes any difference whether the contract is to sell specific stock or not. Further, undoubtedly a purchaser of stock may as against the seller be entitled to dividends and liable for calls though the stock has not been transferred to his name, and it is probable that the presumption that an immediate transfer is intended — a presumption which applies to sales of other personal property — applies to sales of stock also. The purchaser is therefore presumably entitled to an immediate transfer, and to all future dividends, and is immediately liable for all calls; but it has not yet been decided that after a contract to sell stock at a future day the purchaser is entitled to dividends and liable for calls and assessments in the mean time. The cases on dividends are collected in Cook, Stock and Stockholders, § 539. As to calls, see Coles *v.* Bristowe, L. R. 6 Eq. 149, 4 Ch. 3; Hawkins *v.* Maltby, 4 Ch. 200. The case of calls is somewhat different from that of dividends. Clearly if a purchaser contracts for shares half paid up, he should not be entitled to full paid shares at the same price.

[4] The leading case is Richards le Taverner's case, Dyer, 56 *a*: "A man makes a lease for years of land and of a stock of sheep, rendering certain rent, and all the sheep died: it was asked upon the indenture of Richards le Taverner, whether this rent might be apportioned? And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder; otherwise is it if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were Bromeley, Portman, Hales, *Serjeants*, Luke, *Justice*, Brooke and several of the Temple. But Marvyne, Brown, *Justices*, Townshend, Griffith, and Foster *e contra*; but all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by More in the following Lent. And it seemed to him, and to Brooke, Hadley, Fortescue

where the lessee expressly covenanted to pay the rent he must keep his covenant, though the leased property suffered injury by accident.[1] In the present century the landlord has been allowed to

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and Brown, *Justices*, that the rent should be apportioned because there is no default in the lessee.

The statements in this case as to the effect of gain by the sea or burning by wildfire are cited in the leading case of Paradine *v.* Jane, Aleyn, 26, and frequently since, as authority, but it certainly does not appear what view the majority of the court held.

In Rolle's Abridgment, 236, it is said that if a man leases land and part is surrounded by fresh water, there will be no apportionment because the tenant shall have the fish and may be expected to regain the land. So if the land is burned over by wildfire, but if part of the land is surrounded by salt water, there will be an apportionment, because any one may fish in the water, and there is no reasonable possibility of regaining the land.

The substance of this is repeated in 6 Bacon's Abridgment (6th ed.), 49, 50, and in Chief Baron Gilbert's treatise on Rent, 186, 187 (1758). But see the case of Paradine *v.* Jane, Aleyn, 26, in the following note.

[1] Paradine *v.* Jane, Aleyn, 26, was an action of debt on a lease rendering rent. The defendant pleaded that Prince Rupert, an alien enemy with a hostile army, had expelled him and kept him out of possession. This was held insufficient. "And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; . . . but when the party by his own contract creates duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer 33 *a*, 40 E. 3. 6. h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation then being a covenant in law, and whereupon a covenant hath been maintained (as Rolle said), it is all one as if there had been an actual covenant."

After this it seems not to have been doubted that at least if the tenant had covenanted to pay rent he would not be excused at law. Monk *v.* Cooper, 2 Ld. Ray. 1477; S. C. 2 Strange, 763; Shubrick *v.* Salmond, 3 Burr. 1637, 1640; Pindar *v.* Ainsley (Lord Mansfield, 1763), 1 T. R. 312; Belfour *v.* Weston, 1 T. R. 310; Baker *v.* Holtpzaffell, 4 Taunt. 45; Izon *v.* Gorton, 5 Bing. N. C. 501; Arden *v.* Pullen, 10 M. & W. 321. And the law in this country is generally the same. Osborn *v.* Nicholson, 13 Wall. 654, 660; Warren *v.* Wagner, 75 Ala. 188; Cowell *v.* Lumley, 39 Cal. 151; Robinson *v.* L'Engle, 13 Fla. 482; Coy *v.* Downie, 14 Fla. 544; White *v.* Molyneux, 2 Ga. 124; Lennard *v.* Boynton, 11 Ga. 109; Pope *v.* Garrard, 39 Ga. 471; Peck *v.* Ledwidge, 25 Ill. 109; Smith *v.* McLean, 22 Ill. App. 451, 454; Womack *v.* McQuarry, 28 Ind. 103; Skillen *v.* Waterworks Co., 49 Ind. 193, 198; Harris *v.* Heackman, 62 Ia. 411; Redding *v.* Hall, 1 Bibb 536; Helburn *v.* Mofford, 7 Bush, 169; Lamott *v.* Sterett, 1 Har. & J. 42; Fowler *v.* Bott, 6 Mass. 63; Kramer *v.* Cook, 7 Gray, 550, 553; Gibson *v.* Perry, 29 Mo. 245; Hallett *v.* Wylie, 3 Johns. 44; Gates *v.* Green, 4 Paige Ch. 355; Patterson *v.* Ackerson, 1 Edw. Ch. 96; Howard *v.* Doolittle, 3 Duer, 464; Graves *v.* Berdan, 26 N. Y. 498, 500; Hilliard *v.* New York, &c. Co., 41 Ohio St. 662; Harrington v. Watson, 11 Ore. 143; French *v.* Richards, 6 Phila. 547; Diamond *v.* Harris, 33 Tex. 634; Cross *v.* Button, 4 Wis. 468. But the law is otherwise in South Carolina, Ripley *v.*

recover in an action for use and occupation, though the premises were entirely destroyed;[1] and now it is not likely that much weight would be given in the form of the lease, if it contained no proviso relieving the tenant. In one or two early cases it was intimated that the tenant might have relief in equity from his legal liability,[2] but these cases have been overruled.[3]

In England no distinction is made between partial destruction of the leased premises as where leased land remains after the calamity, and total destruction as where the lease is of a single room or story of a building without land, and the entire building is destroyed. In the latter case, as well as the former, the tenant must pay rent.[4] In this country, however, the tenant is relieved in case of total destruction of the leased premises.[5] It is difficult to see how total

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Wightman, 4 McC. 447; Coogan *v.* Parker, 2 S. C. 255; and perhaps in Kansas, Whitaker *v.* Hawley, 25 Kan. 674. It is immaterial that the lessor had insurance on the property, and has collected the money and refuses to rebuild. Skillen *v.* Water Works Co., 49 Ind. 193, 198; Bussman *v.* Ganster, 72 Pa. 285; Hoy *v.* Holt, 91 Pa. 88, 90. And if the lessee builds he has no right to the insurance. Ely *v.* Ely, 80 Ill. 532. See also Leeds *v.* Cheetham, 1 Sim. 146; Lofft *v.* Dennis, 1 E. & E. 474.

[1] Izon *v.* Gorton, 5 Bing. N. C. 501. And see Packer *v.* Gibbins, 1 Q. B. 421.

[2] In Harrison *v.* Lord North, Ch. Cas. 83, the plaintiff sought to be relieved from payment of rent for a house which was taken from his possession during the civil war for use as a hospital. For the plaintiff it was argued that this was not like an ordinary case of ouster by a third person, for there was no remedy over. For the defendant it was said: "The plaintiff hath a pitiful case, but not such as this court can relieve, for the law and equity is all one in this case, . . . and cited the case of Carter and Cummins about two years since in this court, where the plaintiff being a tenant of a wharf, which by an extraordinary flood was carried all away, brought his bill to be relieved against paying of his rent, but all the relief he had was only against the penalty of the bond, which was broken for non-payment of rent; and the defendant ordered only to bring debt for his rent . . . The Lord Chancellor (Sir Orlando Bridgeman) took time to advise; but declared if he could he would relieve the tenant."

In Brown *v.* Quilter, Ambler, 619, Lord Chancellor Northington expressed surprise that it was considered so clear that the landlord could recover rent at law, and said that "when an action is brought after the house is burnt down, there is a good ground of equity for an injunction till the house is rebuilt." The bill was in fact dismissed because the landlord in his answer offered to cancel the lease, and the tenant declined to accept a cancellation. The same Chancellor is said to have proceeded upon the same theory in Camden *v.* Morton, 2 Eden, 219; and Lord Apsley adopted it in Steele *v.* Wright, cited in 1 T. R. 708. See also Weigall *v.* Waters, 6 T. R. 488, 489, per Lord Kenyon.

[3] Hare *v.* Groves, 3 Anstr. 687; Holtzapffell *v.* Baker, 18 Ves. 115; Leeds *v.* Chatham, 1 Sim. 146, 150. See to the same effect Redding *v.* Hall, 1 Bibb, 536; Harrison *v.* Murrell, 5 T. B. Mon. 359; Lamott *v.* Sterett, 1 Har. & J. 42; Hicks *v.* Parham, 3 Hayw. (Tenn.) 224.

[4] Izon *v.* Gorton, 5 Bing. N. C. 501.

[5] McMillan *v.* Solomon, 42 Ala. 356; Ainsworth *v.* Ritt, 38 Cal. 89; Alexander *v.* Dorsey, 12 Ga. 12; Womack *v.* McQuarry, 28 Ind. 103; Shawmut Nat. Bank *v.* Boston,

destruction of the property leased should have any effect upon a covenant to pay rent if partial destruction has none. The only ground for relieving in the former case is because there has been a failure of consideration. If this is true, it follows that there is a partial failure of consideration in the latter case.

In one case it was intimated that a calamity occurring before the tenant was entitled to possession under the lease, although not causing the total destruction of the property, entitled the tenant to rescind the lease,[1] but this distinction can hardly be supported.

A contract to make a lease should stand on the same footing as a contract to convey a freehold estate, though this is not clearly admitted in the cases.[2]

The distinction between an actual lease and a contract is obvious. In the first case the lessee acquires by the deed an actual legal estate. If that is what he bargained for, it is clear that immediately after the conveyance he has received the consideration for the rent. No further performance is due from the lessor. This would be abundantly clear if rent were customarily paid in a lump sum on execution of the lease, instead of in instalments at stated periods. It is, therefore, not a little odd to find it universally admitted that it is a harsh rule of strict law which requires a tenant

118 Mass. 125, 128; Graves *v.* Berdan, 39 Barb. 100, 26 N. Y. 498: Hilliard *v.* New York, &c., 41 Ohio St. 662, 666; Harrington *v.* Watson, 11 Ore. 143, 145; Hahn *v.* Baker Lodge, 21 Ore. 30, 34; Conn. Mut. Life Ins. Co. *v.* United States, 21 Court of Claims, 195, 201. But in Kentucky the English law is followed, Helburn *v.* Mofford, 7 Bush, 169.

[1] Wood *v.* Hubbell, 10 N. Y. 479, 487. Compare Edwards *v.* McLean, 122 N. Y. 302.

[2] In Bacon *v.* Simpson, 3 M. & W. 78, it was held that a plaintiff who contracted to assign a lease of a furnished house could not recover damages from one who contracted to buy it, and refused to perform on account of partial destruction because he himself was not ready to perform. It is true the action was at law, and the lease included personal as well as real property, but the decision is not rested on these grounds. In Counter *v.* Macpherson, 5 Moo. P. C. 83, the landlord agreed to put the premises in repair and put up an additional building. Before this work was completed, the premises were partially burned. The landlord was held not entitled to specific performance because the work was not completed, and this seems a sufficient reason. Huguenin *v.* Courtenay, 21 S. C. 403, was a suit by the seller for specific performance of an agreement for the sale of a lot of land on the shore of an island, the fee of which was nominally in the State, the occupants having legally an estate from year to year and paying as rent one penny annually, but having for practical purposes the absolute ownership. Before the day appointed for transfer of title the sea washed away a portion of the lot. The court, though expressing assent to the doctrine of Paine *v.* Meller, 6 Ves. 349, gave judgment for the defendant, and distinguished the case of a sale of a leasehold estate. On appeal the decision was affirmed. The decision was clearly right on any view, because the agreement was subject to a condition which so far as appeared had not been performed, and the appellate court made, this a secondary ground of decision.

to pay rent when the leased premises are destroyed, — a rule from which it was decided only after some conflict that equity would not relieve, — to find that in New York by statute,[1] and in South Carolina by judicial decisions,[2] a tenant, the actual owner of a legal estate, is relieved from liability by substantial destruction of the premises, and that almost universally in this country total destruction of the leased premises terminates the tenant's liability, and yet to find frequently, in these same jurisdictions, that one who has agreed to buy real estate in the future, though perhaps discharged at law by accidental injury to the property, is regarded by a court of equity as already having such an ownership in the property that he must pay for it. The facts and opinion of the court in Huguenin *v.* Courtenay[3] are suggestive in this connection. The court says, in substance, if a tenant is relieved by destruction of the leased premises, he surely cannot be liable if the premises are destroyed after an agreement to lease in the future; and a lease is a lease though it be for 999 years and whatever the rent; but if, instead of a lease substantially equivalent to a fee, the subject matter of the agreement were in fact a fee, the seller would be entitled to the price.

Doubtless the reason why a tenant is relieved to the extent that he is in case of accidental injury or destruction to the leased premises, is because the parties to a lease are apt to regard it rather as a contract than as a conveyance. "A lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant, rather than a completed contract."[4] If this were granted it would only make a lease analogous to a contract for the sale of real estate, and if the tenant is relieved in the former case, the vendee should be in the latter. Yet the same court which exhibited such tenderness for the lessee as thus to construe a lease has twice decided that a vendee is liable to pay to the vendor the contract price for land

[1] Chap. 345 of Laws of 1860 provides "the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises and of the land so leased or occupied." For the construction of this statute, see Suydam *v.* Jackson, 54 N. Y. 450; Butler *v.* Kidder, 87 N. Y. 98; Edwards *v.* McLean, 122 N. Y. 302.

[2] Ripley *v.* Wightman, 4 McC. 447; Coogan *v.* Parker, 2 S. C. 255.

[3] 21 S. C. 403.

[4] Whitaker *v.* Hawley, 25 Kan. 674, 687, per Brewer, J.

taken by eminent domain before transfer of the property, becoming entitled thereby to damages for the taking.[1] In the later of these two decisions the assessed damages were exactly one-third of the contract price.[2]

Samuel Williston.

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[1] Kuhn *v.* Freeman, 15 Kan. 423; Gammon *v.* Blaisdell, 45 Kan. 221. When Kuhn *v.* Freeman was decided, the eminent judge who wrote the opinion of the court in Whitaker *v.* Hawley, *supra*, was a member of the court.

[2] A lease of personal property might be thought to approach more closely to a continuing contract, but such leases are rare. In the Southern States leases of slaves were formerly not unusual, and opinion was divided as to whether the loss in case of death fell upon the lessor or lessee. It was held that the lessee was excused from paying the stipulated hire in Collins *v.* Woodruff, 9 Ark. 463; Dudgeon *v.* Teass, 9 Mo. 857; Bacot *v.* Parnell, 2 Bailey, 424; Maldrow *v.* Wilmington, &c. R. R., 13 Rich. 69; Townsend *v.* Hill, 18 Tex. 422; George *v.* Elliott, 2 Hen. & Mun. 5. So emancipation by law was held to relieve the hirer from any obligation to pay rent thereafter. Wilkes *v.* Hughes, 37 Ga. 361; Mundy *v.* Robinson, 4 Bush, 342. On the other hand, by other courts it was held that the hirer was not relieved in case of the slave's death: Ricks's Adm. *v.* Dillahunty, 8 Port. 134; Lennard *v.* Boynton, 11 Ga. 109; Harrison *v.* Murrell, 5 T. B. Mon. 359 (see also Redding *v.* Hall, 1 Bibb, 536; Griswold *v.* Taylor's Adm., 1 Met (Ky.) 228; Hughes *v.* Todd, 2 Duv. 188); Harmon *v.* Fleming, 25 Miss. 135; Hicks *v.* Parham, 3 Hayw. (Tenn.) 224; Wharton *v.* Thompson, 9 Yerg. 45; Dickinson *v.* Cruise, 1 Head, 258; or emancipation, Coward *v.* Thompson, 4 Coldw. 442. In all these cases it is to be noticed there was not simply deterioration, but absolute destruction of the leased property. But slaves were an unusual kind of chattel, and it was held that the lease of a slave gave the lessee a property right, an estate in the slave so to speak, for the term of the lease: Smoot *v.* Fitzhugh, 9 Port. 72; Harmon *v.* Fleming, 25 Miss. 135; McGee *v.* Currie, 4 Tex. 217, 222. Specific performance was also granted of contracts relating to them. Murphy *v.* Clark, 9 Miss. 221; Williams *v.* Howard, 3 Murph. 74; Horry *v.* Glover, 2 Hill's Ch. 515; Henderson *v.* Vaulx, 10 Yerg. 30, 37. Compare Randolph *v.* Randolph, 6 Rand. 194.

A lease of a furnished house includes personal as well as real property. In Whitaker *v.* Hawley, 25 Kan. 674, it was held that the absolute destruction of the personal property relieved the tenant from the payment of the rent reserved as a lump sum for both personalty and realty, but it was held otherwise in Bussman *v.* Ganster, 72 Pa. 285. See also Womack *v.* McQuarry, 28 Ind. 103; Clinton *v.* Hope Ins. Co., 45 N. Y. 454. A contract to assign the residue of a term in a furnished house was held excused by the destruction of the premises. Bacon *v.* Simpson, 3 M. & W. 78.

In the civil law a hiring gives the hirer merely a contractual right, and wherever that system of law prevails, the hirer is excused not simply by the destruction, but also by the injury of the leased property, to an extent proportional to the injury. Hunter's Roman Law (2d ed.), 506, 508. Pothier, Contrat de Louage, sections 138–143; Code Civil Art. 1722, 1 Bell, Comm. (9th ed.) § 1208; Windscheid, Lehrb. des Pandekt. § 400; Code of Louisiana, Art. 2667. The law in Newfoundland seems to be the same, by custom. Broom *v.* Preston, Sel. Cas. S. C. Mewf. 491 (referred to in Gates *v.* Green, 4 Paige, Ch. 355). A lease in the civil law is, therefore, analogous to a contract of sale. The civilians who support the doctrine of the Roman law as to risk in contracts of sale, have always been troubled to reconcile the law as to leases. Hofmann seems clearly right in saying that reconciliation is impossible. Periculum beim Kaufe, 18–21.